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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 349

ACY LENNON,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent,

—o—

ACY LENNON,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDIX

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IN THE

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Number .....

ACY LENNON,

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ACY LENNON,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDIX

To the Honorable the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, to review two judgments of that Court, both entered

June 12, 1957 (petition for rehearing thereof denied July 12, 1957), affirming a judgment of conviction of the United States District Court for the Southern District of New York (Archie O. Dawson, J.), in which the petitioner was convicted on four counts of income tax evasion for the years 1949 through 1952 inclusive, and involving for the years in question the following sums:

1949	$388.39
1950	$525.41
1951	$488.50
1952	$390.10.

Petitioner was sentenced to a year and a day on the first count; to a year each on the other three counts (all to run concurrently). Petitioner was also fined $2,000.

Opinions Below*

The opinion of the Circuit Court of Appeals (by Sterry R. Waterman, U. S. Circuit Judge) appears at page 2a herein, and is reported at ..... F. 2d (Adv.) ..... 57-2 U. S. T. C. ..... The judgments appear on page 11a herein.

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*References to the record are indicated as follows:

(A followed by page number)—indicates appellant's appendix below.

(G followed by page number)—indicates appellee's appendix below.

(P followed by page number)—indicates page of appendix annexed to this Petition.

(T followed by page number)—indicates transcript of testimony.

Jurisdiction

The judgments of the Circuit Court of Appeals were entered June 12, 1957 (P. 11a).

Petition for rehearing was filed June 27, 1957 and was denied July 12, 1957 (P. 11a).

There has been no extension of time for filing this petition.

The jurisdiction of this Court in invoked under 62 Stat. 928, 28 U. S. C. A. 1254; 62 Stat. 963, 28 U. S. C. A. 2106; Rules 19 and 22(2) of the Rules of this Court; and Title 18, U. S. C. A., Rule 37 Federal Rules of Criminal Procedure.

Jurisdiction of the District Court was invoked under 53 Stat. 62, as amended; 56 Stat. 144; 57 Stat. 144; 58 Stat. 234; 26 U. S. C. A. 145(b).

Jurisdiction of the Court of Appeals was invoked under 65 Stat. 726, 28 U. S. C. A. 1291.

Reasons Relied on for Granting Writ*

1) By permitting petitioner's trial to be transformed "into an arena for political exposés" involving petitioner's employer, Congressman Adam Clayton Powell, the Court of Appeals so far sanctioned, and itself so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

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*Quotations in this section are from the opinion of the Court of Appeals used in describing petitioner's claim of prejudice. Significantly, the Court of Appeals nowhere wrote that the complained of prejudice had not occurred.

2) As a result of the prosecution devoting two-thirds of petitioner's trial to the issue of an alleged payment of $3,000 to Congressman Powell and the political insinuations attendant thereon, which issue was irrelevant and prejudicial to petitioner, petitioner was deprived of the fair, unprejudiced and impartial trial guaranteed to him by the Constitution of the United States.

3) The act of the Trial Court in ultimately striking the offensive testimony, and the delivery by the Trial Court of a perfunctory admonition to the jury to disregard such prejudicial testimony, did not overcome "the prejudice created during several days of lengthy testimony by a number of Government witnesses".

4) The petitioner having been convicted after an unfair and prejudicial trial, there was a complete misapplication by the Court of Appeals of the decisions by this Court as to the judgment to be rendered following such a conviction.

5) Each count upon which the petitioner was convicted charged two unrelated issues. The cause was submitted to the jury under an instruction which left the jury free to combine the issues and thus to convict the petitioner of the acts charged by less than the unanimity required by law. The propriety of the instructions, under the circumstances of this case, affects all criminal prosecutions and has not been, but should be, settled by this Court.

The Questions Presented

1) Where the trial record is clear that the defendant's trial was prejudiced by the persistent injection of improper, irrelevant and prejudicial evidence, and where the Court of Appeals, on review of the record, describes the defendant's assertion of prejudice as substantial and that

there is much merit to his claim that the Trial Court's instruction to the jury did not overcome such prejudice, the Court of Appeals may not overlook such prejudice and affirm on its own conclusion of defendant's guilt but must reverse and remand for a new trial.

2) When multiple issues were presented to the jury in a single count and the defendant requested a special verdict on each issue (which request was denied and an exception taken thereto), so that on the main charge the jury was left free to reach a compromise verdict, the Court of Appeals erred in failing to reverse and remand for a new trial.

3) When, after beginning its deliberations, the jury returned for special instructions as to its findings with regard to the multiple issues in each count, and the response of the Trial Court thereto was misleading so that a compromise verdict was encouraged, the fact that the main charge may have been correct did not overcome the error of the final instruction and the Court of Appeals erred in failing to reverse and remand for such error.

Statutes Involved

The statutes involved in this case are as follows:

Constitution of the United States, Fifth Amendment;

Constitution of the United States, Sixth Amendment;

26 U. S. C. A., 145(b);

28 U. S. C. A., 2111;

Title 18, U. S. C. A., Rule 31(a), Rules of Criminal Procedure;

Title 18, U. S. C. A., Rule 52, Rules of Criminal Procedure;

and are set forth in the appendix herein.

Statement of the Case

The defendant, Acy Lennon is one of three Congressional secretaries of Congressman Adam Clayton Powell. In the course of an investigation into the affairs of Congressman Powell, all three of his secretaries were indicted.

Of the three, one Mrs. Dodson was tried and convicted a few months before the defendant was. The third, William Hampton has not yet been tried and his case is not on the trial calendar.

In both the *Dodson* and *Lennon* cases, the principal witness for the prosecution was Joseph E. Ford, a former Democratic District Leader and former campaign manager of Congressman Powell (T. 68). Ford had broken with the Congressman in 1951 and at the time of the trial of the defendant was the Congressman's political enemy (A. 112a-113a). Prior to having broken with the Congressman, Ford's second in command was the defendant (A. 41a).

The defendant was indicted in 1956 on six counts of alleged income tax invasion (A. 3a-14a). Under the first four counts, relating to the years 1949 through 1952 inclusive (and on which four counts he was convicted), he was charged with knowingly understating his income and with claiming exemptions in each of those years for two dependent sons when he was not entitled to claim such two sons as exemptions (A. 15a-20a).

With regard to the understated income for the years 1949, 1950 and 1951, the indictment charged the failure to report income received by the defendant as an employee of Joseph E. Ford in the latter's tax service (A. 18a-19a). Ford claimed to have paid the defendant $1,600 by check in 1949; $1,700 by check in 1950 and, $1,600 in cash in 1951 (A. 33a-41a). The checks were introduced into evi-

dence (Exs. 9, 10) but these showed that Ford was the last endorser and had received the cash from the checks (A. 38a-41a). The bank involved also verified that Ford had received the proceeds of the checks (A. 156a-157a). Ford, however, testified that he had given the cash to the defendant. So that with regard to these alleged payments there was only Ford's uncorroborated story.

With regard to the unreported income for the year 1952, this was an amount of $1,500 allegedly received by the defendant as commissions on the sale of cooperative apartments in an interracial housing project, and allegedly unreported by him (A. 19a).

The $1,500 transaction turned out to be a $3,000 payment made by one David Kent, the builder of an interracial housing project.* The payment of $3,000 had been made by check to a nonprofit corporation known as Tenants Protective Association (G. 8a, 14a-15a). There was no evidence that defendant was an officer, director or employee of T. P. A. (G. 70a). The records of T. P. A. showed that the $3,000 had not been paid out to defendant but to one Paul Klein (G. 63a-64a)—a friend of Congressman Powell (G. 35a).

There was absolutely no evidence that the defendant received any part of this $3,000. As a matter of fact, all the evidence pointed away from the defendant. Indeed, and as Judge Dawson stated in dismissing this item from the case:

> " * * * there is no testimony that it was paid out to Mr. Lennon * * * I find no evidence connecting that $3,000, or any part of it, with Mr. Lennon * * * " (T. 971).

---

*The Government charged that Hampton received one-half of this $3,000 amount and the defendant the other half (T. 10-12).

The Government at all times tacitly admitted that the defendant never received the money (see Point I, *infra*, T. 11, A. 136a). Its position always was that Congressman Powell received this money.

With regard to the prosecution's claim of improper dependents, here again the principal witness was Joseph E. Ford. Ford testified that in a 10 year period he never heard the defendant mention any sons, nor on occasional visits to the defendant's home had he seen any sons (A. 41a-43a). The prosecution also produced the defendant's daughter who testified that she had no brothers living at home but she had heard rumors that she had brothers (A. 74a).

The prosecution offered no other testimony or evidence with regard to the issue of dependents.

The Unreported Income From The Sale of Apartments For The Year 1952:

Out of some 328 pages of direct testimony by Government witnesses, 212 of those pages, two-thirds of the Government's entire case, was devoted to this particular item.

The testimony with regard to this issue was spread throughout the Government's direct case.

It was on this issue that the prosecution, allegedly devoted to assuring the defendant a fair trial, managed to ring in the following prejudicial and unrelated items:

a) the F.H.A. scandals;

b) the Senate investigation of F.H.A. scandals;

c) the F.B.I.;

d) the insinuation of impropriety in the conduct of Congressman Powell; and

e) the absence of "White House" pressure in causing Congressman Powell to take the stand as a prosecution witness.

As the prosecution used the trial to introduce these juicy and news-worthy bits of scandal, it continually assured the Trial Court that ultimately a connection with the defendant and his indictment would be made (G. 53a-55a, 61a, 64a, 67a, 70a, 77a-78a, 81a-82a).

The connection was never made.

Yet, by the time the prosecution completed the presentation of its case, the atmosphere of the trial was redolent with the smell of fraud, perjury and political corruption. The technique employed was that of guilt by association.

The Trial Court threw out the entire issue at the end of the prosecution's case. The irreparable damage, however, had been done.

It is out of this issue that the petitioner's claim of prejudice and the unfairness of his trial arises.

The indictment, as amplified by the Government's bill of particulars, stated that on August 8, 1952 the petitioner received $1,500 as "commissions on sale of apartments" (A. 16a).

In its *opening to the jury*, the Government stated its contention as follows:

> a) One David Kent, the builder of an interracial housing project in Queens County, New York City, enlisted the aid of Congressman Powell to obtain purchasers for the cooperative apartments in the project;
>
> b) Congressman Powell agreed to push the sales of the apartments and also agreed that the sale

of the apartments was to be pushed through the offices of the Abyssian Baptist Church (of which the Congressman was the minister) and through his congressional office in New York City;

c) The defendant and one William Hampton (another of Congressman Powell's secretaries) were to act as sales agents;

d) A commission of $15 on each apartment sold was to be received from the builder, Mr. Kent;

e) The sales were in fact pushed by Congressman Powell, and the defendant and Mr. Hampton acted as the sales agents.

The Government then continued in its opening, as follows:

"Now, in July, 1952, when it came time for Mr. Kent to pay Mr. Lennon and Mr. Hampton the $3,000 which they earned for selling these apartments, *Mr. Kent did not pay the money directly to Mr. Lennon and Mr. Hampton.* Instead, at their request, he turned over to Mr. Lennon a check in the amount of $3,000 payable to the Tenants Protective Association. That was a small corporation, a non-profit corporation. *Now, this was a subterfuge to hide the income earned by Mr. Lennon and Mr. Hampton. They did not wish to pay income taxes on this amount because the money actually was to be Congressman Powell's to dispose of* * * *

"Now, shortly after Mr. Kent turned over this $3,000 to Mr. Lennon, Congressman Powell asked an intimate friend of his to obtain the money from Mr. Lennon and Mr. Hampton. The $3,000 had been deposited to the account of the Tenants Protective

> Association on July 11, 1952. *Exactly three days later this same $3,000 was transferred by check to this friend of Mr. Powell's. He held on to the check for more than three months, did not cash it until a few days before election time in 1952. Congressman Powell was running for reelection in 1952.*" (T. 8-12, emphasis supplied.)

Objection was promptly made at the very start of the Government's opening statement to the jury introducing this collateral issue (T. 9). The Trial Court overruled this objection. Thereafter a parade of witnesses took the stand with regard to this issue. David Kent, the builder, was called as a Government witness and testified that he did not pay the defendant or Hampton personally, but had paid the Tenants Protective Association (G. 14a-15a). Despite the fact that he was the prosecution's witness, the prosecution didn't hesitate to question Mr. Kent as to his being questioned by the F.B.I.; by the Senate Committee investigating F.H.A. scandals; by the Treasury Department; and, by a Grand Jury (G. 15a-18a).

In addition to Mr. Kent, the Government called Paul Klein, a personal friend of Congressman Powell, who "borrowed" the $3,000; Heinrich Ludeke, a banker whose bank had certified the $3,000 check to Paul Klein; Anna C. Perry, and Harrison Jackson, two officers of the Tenants Protective Association, who testified that they knew nothing at all about the $3,000 transaction; Congressman Powell and Special Treasury Agents Hanley J. Bulson and Morris J. Emanuel.

Throughout all of the foregoing testimony there was no attempt by the Government to show that the defendant had in fact received any money at all. The entire bent of the Government's presentation was to show that the money had actually been received by Congressman Powell (G. 101a-102a, T. 12, G. 60a).

Although the defense maintained a continuing series of objections as to irrelevancy and prejudice (G. 10a, 27a-29a, 38a-39a, 57a, 64a, 70a, 84a, 88a, 96a, 98a, 99a, 101a, 102a, 116a, 143a), and although even the most naive could see that the prosecution's prime interest was Congressman Powell and not the defendant, the Trial Court allowed day after day of this type of testimony on the cynical assurance by the prosecution that ultimately all would be connected with the defendant.

To illustrate the prosecution's use of the trial as a means of politically exposing Congressman Powell, the jury was treated to the spectacle of Congressman Powell attempting to explain to the prosecution who had called him why certain records of his church and of the Tenants Protective Association were missing or had been destroyed. There was not the slightest indication nor did the prosecution offer, that those records had any connection with the defendant (G. 113a-116a).

With regard to the testimony of Paul Klein, also a prosecution witness, and who took the stand on three separate days and testified at great length, the prosecution displayed a completely callous disregard for the defendant's rights.

Before the Treasury Department and before the grand jury, Klein admitted to borrowing the $3,000 in issue (G. 20a-27a, 32a-33a, 36a-51a). Later, but some six months before taking the stand at the trial, Klein told the United States Attorney that his recollection had changed and that he had no recollection of having borrowed money at all (G. 32a, 57a-61a, 146a-150a).

Yet having known for six months that the witness Klein had changed his story, and was claiming no knowledge of the transaction, the prosecution put him on the stand on three separate days, with the only discernible reasons being

the spectacle created by the witness' public confession of his relationship to Congressman Powell and his own moral poverty, or an attempt to lay a foundation for a perjury prosecution.

When, after the first two hours of Klein's testimony, and numerous defense objections, the Trial Court questioned the prosecution as to the purpose of the testimony, the prosecution's answer was that it was trying to refresh the witness' recollection as to the $3,000 (G. 53a-55a). And this after six months prior knowledge that the witness had no recollection at all.

The prosecution conveniently "forgot" that it had told the jury in its opening that Paul Klein had received the money knowing at the time that it made that statement that Klein would refuse to so testify (T. 11-12).

There was absolutely no attempt by the Government to show any connection between the defendant and the $3,000 paid to the Tenants Protective Association.

Mr. Ludeke testified that the bank records showed the $3,000 check to have been payable to Paul Klein, certified and cashed (G. 65a-66a).

Anna C. Perry and Harrison Jackson, two of the officers of T. P. A. with check signing powers (Congressman Powell was the only other person authorized to sign checks) couldn't recall having signed the check to Klein (G. 76a-83a).

Congressman Powell testified that Klein had received the money from T. P. A. with his approval (G. 90a-100a).

Agents Bulson and Emanuel testified that they did not (the inference was "could not") obtain the records of T. P. A. (G. 126a-131a).

None of the witnesses called even remotely suggested that the defendant had received any portion of the $3,000.

The Political Atmosphere At The Trial:

The Court will recall that this trial was conducted against the backdrop of a national election. The trial had opened on October 4th, 1956.

One week later, on October 10th, and in front of the jury, the trial court and the Government engaged in a colloquy relating to the Government's inability to serve a subpoena on Congressman Powell. This was done despite the fact that the entire matter had been previously discussed at the bench, outside the presence of the jury, and no further discussion was required. Yet, in the presence of the jury, the trial court announced that the United States Marshal had, up to that point, been unsuccessful in serving a subpoena upon Congressman Powell, who was to be a witness in the case. The inference that Congressman Powell, the defendant's employer, was "ducking" couldn't have been plainer (T. 661-663).

When counsel for the defendant asked the Trial Court to tell the jury that the court's remarks concerning Congressman Powell were not to be held against the defendant, the court equivocated (T. 663).

On Thursday, October 11, 1956, the following day, and despite the fact that there again had been a full discussion in the robing room, the same performance with regard to the Government's inability to subpoena Congressman Powell was repeated before the jury (T. 664-674).

On the afternoon of Thursday, October 11, 1956, Congressman Powell, from the steps of the White House, announced his support of President Eisenhower's bid for re-election (see any newspaper of that day). Immediately charges and counter charges of "political deal" and political pressure were hurled in every news medium available throughout the length and breadth of the land. In every

one of those charges the tax case against the defendant was prominently mentioned.

On Monday, the first witness called by the Government was Congressman Powell, and as soon as Congressman Powell took the stand as a government witness, the very first question of consequence asked of him by the prosecution was as follows:

> "Q. Now, Dr. Powell, has any pressure in any manner, shape or form, directly or indirectly, been put on you by the White House or anybody in the United States Government in connection with this case?" (A. 131a).

Although the vigorous objection of the defense was sustained, the entire build-up was obviously nothing more than a design on the part of the Government to convert the trial into a side show to the main-ring presidential campaign.

The political nature of the trial had been introduced as early as the prosecution's opening with the statement that:

> "He (Klein) held on to the check for more than three months, did not cash it until a few days before election time in 1952. *Congressman Powell was running for reelection in 1952*" (T. 11-12).

There was not the slightest attempt by the prosecution to show what materiality any election or the "White House" had with the charges against the defendant.

The Striking Out Of All Of The Testimony Relevant To The "Powell Money".

At the close of the Government's case, Judge Dawson made a simple announcement to the jury informing them that he had stricken all of the testimony relating to this

extraneous and highly prejudicial issue. All he said to the jury was the following:

> "That the evidence received was that the check for $3,000 was paid to the Tenants Protective Association to be put in their bank account and thereafter the testimony was that the $3,000 was paid out maybe to Mr. Klein or maybe to somebody else. The testimony is a little vague due to the lapse of memory of Mr. Klein about the situation, but there is no testimony that it was paid out to Mr. Lennon. And, therefore, insofar as the $3,000 is concerned, I find no evidence connecting that $3,000, or any part of it, with Mr. Lennon as an individual. Therefore, I will remove that item from consideration by the jury—I say that at the present time so that the jury will understand that the issue of $3,000 is no longer in this case" (T. 970-971).

Although the prejudicial testimony had run through some two weeks of the prosecution's case, the Trial Court took less than a minute to attempt to wipe the entire spectacle from the minds of the jury.

The Reaction Of The Court Of Appeals To The Prejudice Issue.

In its opinion, the Court of Appeals introduced its consideration of this issue of prejudice with the following statement:

> "Far more substantial is the appellant's assertion of prejudice" (P. 9a).

After reviewing the claim by the defendant concerning the issue of prejudice, the Court of Appeals went on to state:

"It is the appellant's position that the striking of such evidence and the subsequent admonition to the jury by the Court to disregard that evidence were insufficient to dispel the prejudice created during several days of lengthy testimony by a number of government witnesses. There is much merit to this contention. * * *

"Nevertheless, despite our abhorrence of any effort by either party to insinuate politics into a criminal prosecution, we do not believe that this appellant is entitled to a new trial on the facts and circumstances of this case.

"Our reasons for so believing are several. (1) Putting any personal skepticism aside, we are not prepared to label as disingenuous the Government's initial line of proof concerning the Dorrie Miller project" (P. 9a).

The Court of Appeals then went on to list five other reasons for its decision to affirm (P. 10a). These reasons and the error of the Court of Appeals with regard thereto are more fully covered in the argument.

Basically (albeit inferentially), the Court of Appeals, held that the fairness of defendant's trial was immaterial because, in its opinion, the defendant was guilty. Ignored completely in the opinion was the issue of defendant's Constitutional rights.

Ignored completely was the effect on the jury of all the epithetical evidence of political mud and chicanery. Ignored completely was the fact that a piddling case had been magnified into a national political issue in the course of a presidential campaign.

The Error in the Charge With Regard to the Unrelated Acts in Each Count

Each of the counts in the indictment covered two unrelated acts. In essence, each count charged the defendant with having taken improper exemptions and with having failed to report income which he received. The proof with regard to the improper dependents was limited by the Government to the testimony by two witnesses: Vivien Lennon (the defendant's daughter) and Joseph E. Ford. The testimony of these witnesses on these two issues has been previously summarized.

It is quite clear that the proof offered by the Government with regard to the dependents was completely unrelated to the proof offered by the Government with regard to the unreported income. The Government's position was that the defendant had evaded the payment of income tax and that he had done so by means of two unrelated acts. Proof of one of these acts was not proof of the other.

The Trial Court was early and specifically advised of the defendant's request that each of the unrelated items be specifically charged. Thus, in the argument on motions at the close of the Government's case the following statement was made:

> "* * * depending on how you view it, you are going to give, you have to give two separate issues to the jury, and then taking 1949, 50 and 1951, I imagine, although theoretically the question may be sustained on either of those or both, the situation may very readily arise where the jury will say, 'We don't accept the dependency story, we don't think he evaded on the dependency story, but we do think he evaded on Ford,' or vice versa.

> "Now we run into this situation. I think the Court must know by some manner or means whether the jury's finding is on one or both" (A. 144a-145a).

Again, in the requests to charge delivered in writing to the Trial Court several days before the submission of the case to the jury, a division of the two issues and a request that the jury report on each issue was asked. As was stated at that time:

> "Under no circumstances must the use of an omnibus count be permitted to preclude the defendant from a fair trial by rendering difficult, if not impossible, the testing of the jury's verdict" (A. 168a).

Because the alleged acts of falsity in the tax return (dependents and unreported income) were unrelated, and to avoid the possibility that some of the jurors might find guilt on one and the rest of the jurors find guilt on the other and thus bring in a guilty verdict because all of them agreed on one or the other, the Trial Court was asked to charge each single act.

To the extent that the Trial Court refused to separately charge the two unrelated issues, the defendant excepted to the charge (A. 204a).

At the end of several hours of deliberation the jury came back to the Trial Court with two questions:

> "Is the jury to report a single verdict for an entire count or a separate verdict to each part of each count?"

The answer of the Trial Court was:

> "The jury will return a verdict on the count itself, guilty or innocent of the count."

But the jury had a second and more specific question to ask.

> "If the first alternative is true does the jury understand that a unanimous verdict of guilty to any one or more parts of a particular count could be reported to the court as a verdict of guilty to the entire count?"

The Trial Court answered this question as follows:

> "*It is not necessary to decide on each of the items referred to in the bill of particulars;* it is only necessary to decide whether or not on a particular count which relates to a particular year, the Government has proved beyond a reasonable doubt that a substantial portion of the defendant's tax liability has been wilfully and knowingly evaded by the taxpayer" (A. 201a-203a, emphasis supplied).

Exception to this charge was taken (A. 202a).

The jury deliberated for some 25 hours and then proceeded to bring in a verdict of guilty on the first four counts.

At this point it was impossible to determine whether the defendant had been convicted of unreported income; or had been convicted of taking improper dependents; or had been convicted of both.

On review of the matter the Court of Appeals confused the issue raised with the question of duplicitous indictments and held that the indictments were not duplicitous (P. 6a-7a).

There was no issue presented on the appeal to the Court of Appeals concerning duplicitous indictments. As a matter of fact, the main brief to the Court of Appeals went to great lengths to make certain that the issue of du-

plicitous indictments was eliminated from consideration of the case, and specifically stated:

> "It is respectfully submitted that in the case at bar we present a novel and hitherto unresolved issue" (p. 39 of appellant's main brief).

Having held that the indictment was not duplicitous, the Court of Appeals went on to hold as follows:

> "The jury properly could have based its determination of guilt on a finding that in any given tax year the defendant knowingly understated his income or that he knowingly claimed false exemptions, or that he did both in an attempt to evade taxation. Therefore, the trial court correctly refused the defendant's request to separate these issues for submission to the jury" (P. 6a).

It is impossible to tell from the record or from the jury's verdict which of the three alternatives enunciated by the Court of Appeals occurred.

The Court of Appeals did not find that the Trial Court had made any effort at all to assure the defendant that he would not be convicted by combination of minority verdicts. The opinion was silent on this point—a point which had been thoroughly presented by defendant both to the Trial Court and to the Court of Appeals.

Summary of Argument

Point I

The persistent injection of the irrelevant $3,000 issue and the insinuations of political improprieties attendant thereon was prejudicial and deprived the defendant of a fair trial.

The error was "plain error" within the purview of Rule 52, Rules of Criminal Procedure.

Although petitioner contends that the record shows that proper and prompt objection was taken to the prejudicial nature of the evidence as well as its relevance, the error was preserved for review even if no objection as to prejudice had been made; Rule 52, Rules of Criminal Procedure.

The guilt or innocence of the defendant is not the decisive factor to be considered by the Court of Appeals in deciding whether to reverse for prejudice and an unfair trial.

The reasons advanced by the Court of Appeals for failing to reverse for prejudice are at variance with the holdings of this Court as to the proper disposition to be made of a criminal conviction after a prejudicial trial.

Point II

The multiple issues contained in each count were unrelated.

Petitioner requested separate verdicts so as to make certain, as far as possible, that he was not convicted on a compromise verdict.

The charge of the Trial Court encouraged a compromise verdict.

The failure of the Trial Court to charge the multiple issues separately, or to charge in such manner as to discourage and forbid the jury from reaching a compromise verdict, constituted reversible error.

ARGUMENT

POINT I

The Court of Appeals reversibly erred in failing to reverse and remand for a new trial because of prejudice.

The inclusion day after day of testimony with regard to improprieties which may have been committed by Congressman Powell and others in relation to an inter-racial housing project, none of which was connected with the defendant and all of which was taken by the Trial Court subject to connection, created an atmosphere so prejudicial to the defendant as to impress the jury with the fact that the defendant was part of a cabal of impropriety and created an evil cast to all of his actions. The brief and limited comments of the Trial Court in ultimately striking this evidence from the record did not overcome the prejudice suffered by the defendant.

In reviewing the assertions of prejudice raised by the defendant on his appeal, the Court of Appeals wrote in such manner as to indicate an inferential conclusion that prejudice had occurred. The Court of Appeals also came to the conclusion that there was substantial merit to the defendant's contention that the striking of such evidence and attendant admonition to the jury by the Trial Court to disregard that evidence, were insufficient to dispel the prejudice created during several days of lengthy testimony by a number of government witnesses.

In refusing to reverse, however, the Court of Appeals offered six reasons for such refusal. It is respectfully submitted that those reasons do not begin to overcome the fact that the defendant was convicted at the end of a prejudicial trial. His trial was neither fair nor impartial.

It is submitted that whether or not the language of the Court of Appeals be construed as a finding that prejudice had occurred, the defendant's trial was neither more nor less than a political arena with Congressman Powell as the principal attraction.

Under such circumstances, the failure of the Court of Appeals to reverse runs counter to every standard fixed by this Court for the fair and impartial conduct of a criminal trial.

As to Reason Number 6:

This reason is taken out of order because it is, in essence, the basis for the Court of Appeals' refusal to reverse.

The Court of Appeals concluded that:

> "* * * the guilt of the defendant on the basis of admissible evidence, is clear" (P. 10a).

Here again the permissible inference is that the Court of Appeals felt that prejudice had occurred.

It is respectfully submitted that the guilt or innocence of a defendant is not determinative of the issue of whether a conviction should be reversed after a prejudicial trial.

As was stated in *Kotteakos* v. *U. S.*, 328 U. S. 750, 765:

> "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

The extent of the application of the *Kotteakos* case to the proposition advanced in this petition is clearly seen in *Krulewitch* v. *U. S.* 336 U. S. 440. In the *Krulewitch* case

there was involved a simple hearsay statement, prejudicial in its nature, but not even close to the prejudicial and inflammatory political nature of the testimony in the case at bar set as it was against the backdrop of a national election and in which the real object of the trial was an exposing of the principal witness—Congressman Powell. Thus, in the *Krulewitch* case, at page 444, it is stated:

> "It is contended that the statement attributed to the alleged co-conspirator was merely cumulative evidence, that without the statement the case against petitioner was so strong that we should hold the error harmless. * * * In Kotteakos v. United States, 328 U. S. 750, we said that error should not be held harmless under the harmless error statute if upon consideration of the record the court is left in grave doubt as to whether the error had substantial influence in bringing about a verdict. We have such doubt here."

The guilt of a defendant is not an issue to be considered by an appellate court in deciding whether to reverse because of prejudice. To hold otherwise would be to maintain that constitutional safeguards of a fair trial are available only to those whom the Court of Appeals believes innocent.

> *Kotteakos* v. *U. S., supra;*
> *Mesarosh* v. *U. S.*, 352 U. S. 1, 77 S. Ct. 1, 2, 8;
> *Ex parte Quirin*, 317 U. S. 1, 25;
> *Bollenbach* v. *U. S.*, 308 U. S. 539, 614-615.

In the case at bar, the prosecution kept Paul Klein on the stand for hours and examined him as to the reasons for his recanting his prior testimony. At one point, and after hours of testimony by Klein, all of which was admitted over the most strenuous defense objections of prejudice,

the following colloquy took place between the Trial Court and the witness:

> "The Court: * * * Let me ask you this: Have you been under any medical treatment in the last year and a half?
>
> The Witness: Just casual, cold and like that.
>
> The Court: Have you ever been under any psychiatric treatment?
>
> The Witness: Yes, sir.
>
> The Court: When?
>
> The Witness: Using the word loosely, a clinical psychologist, probably 1954 or perhaps early 1955" (G. 61a).

What difference is there between Klein who recanted his Grand Jury testimony while on the stand, and Mazzei, who in the *Mesarosh* case later showed himself to be so irresponsible as to make his prior testimony in that case suspect?

The spectacle of Klein testifying to his devotion to Congressman Powell, avowing his friendship for the defendant, and recanting his prior sworn testimony and statements was a revolting and sordid spectacle.

Yet it didn't end there. Days later, Paul Klein was recalled to go through the whole sorry business again (G. 143a-150a). The inference was clear that in some way the defendant was involved in the original Grand Jury testimony given by Klein and which he disavowed at the trial. Klein's testimony tainted the defendant in the eyes of the jury even though that testimony did not relate to the defendant's guilt or innocence.

Comparing then the prejudicial evidence to the issue of guilt, what effect did the prejudicial evidence have on the

jury's consideration of the counts upon which it convicted the defendant?

Both in logic and as held by this Court, there is no relationship between guilt and a fair trial. The right to the latter cannot be influenced by the fact of the former.

As to Reason No. 1:

Here the Court of Appeals clearly and unusually placed on record the personal skepticism of its members as to the good faith of the Government in presenting the prejudicial $3,000 issue. Essentially the Court argued that although it was personally skeptical of the Government's good faith in presenting such issue it was not prepared to label this prejudicial line of proof as having been presented in bad faith.

Although there is nothing in the record to support it, the Court of Appeals speculated that at the beginning of the trial the prosecution "believed it could prove that the defendant personally pocketed all or some of the $3,000 allegedly paid to the Tenants Protective Association by David Kent."

The prosecution at no time believed it could prove nor did the prosecution ever intend to prove that the defendant personally pocketed all or some of the money. As a matter of fact, it baldly stated to the Trial Court and to the jury that "the money was actually to be Congressman Powell's to dispose of" (T. 11).

The only theory which the prosecution ever attempted to advance in support of this entire issue was the fanciful idea that the money was to be charged as income to the defendant even though the money went to T. P. A. and inferentially was received by Congressman Powell via Klein.

"The Court: None of that ($3,000) was proved to have gone personally to Mr. Lennon, was it?

Mr. Bolan: *Yes, your Honor, that is correct,* but if I may say there are numerous cases which hold that *it is not necessary for the taxpayer to receive the income at all* * * *" (A. 136a).

Contrary to the Court of Appeals, there was no issue that the money was not paid to the Tenants Protective Association. The proof adduced by the Government at the trial both by bank records and the testimony of its own witnesses established conclusively that the money was actually paid into the account of the Tenants Protective Association and never to the defendant.

In the face of the Government's positive assertion that it did not offer any proof that the defendant received any of that money, the conclusion by the Court of Appeals that the Government believed it could prove that the defendant "pocketed" all or some of the money fails by the wayside. There is nothing in the record to support such a conclusion. As a matter of fact the Government proposed to prove that the money was pocketed by Congressman Powell.

Where the issue is prejudice to a defendant, the Government has the burden of proving that the defendant had a fair trial. The subsisting personal skepticism of the Court of Appeals as to the Government's good faith in presenting a highly prejudicial line of proof, a skepticism which that Court saw fit to memorialize in its opinion, clearly establishes the failure of the Government to sustain its burden of proving that the defendant had a fair and unprejudiced trial.

As was stated in *Kotteakos* v. *U. S.*, *supra:*

> "If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will, notwithstanding this legislation, rest upon the one who claims under it."

Assuming *arguendo* that the prosecution was acting in good faith, neither the good nor the bad faith of the prosecution is a determining factor in deciding whether a trial has been had in accordance with, and under the limitation of constitutional safeguards. The issue is: "Did the prejudice seriously affect the fairness, integrity or public reputation of this trial?" Prejudice, whether it be offered in the guise of good faith or of bad faith, is prejudice nonetheless.

U. S. v. *Atkinson*, 297 U. S. 157, 160;
Bollenbach v. *U. S.*, *supra*.

In the face of its oft stated position that "its duty is not to convict but to see that justice is done," the Government's procedure in this case leaves much to be desired.

Holland v. *U. S.*, 348 U. S. 121, 136.

As to Reason No. 2:

This Court is respectfully referred to the fact that persistently throughout the presentation of this prejudicial testimony, there was a continuing objection by the defense and a continuing acceptance by the Trial Court of the prejudicial testimony as offered by the Government on the ground that at some point in the future all of the testimony would be connected with the defendant. The prejudicial testimony was never connected with the defendant.

In addition, counsel for the defendant made it perfectly clear at the trial that he regarded the testimony on the

Powell issue as being prejudicial as well as irrelevant (see "Statement of Case", *supra*).

Beginning with the Kent testimony, through the Klein testimony, and continuing right on through the testimony of all of the other witnesses, the objection of prejudice, as well as the objection of irrelevance, was made. More important, however, is the fact that even if the objection of prejudice had not been made, the error was preserved for review and the failure to object cannot possibly affect the defendant if in fact prejudice occurred.

> Rule 52, Rules of Criminal Procedure;
> *United Brotherhood* v. *U. S.*, 330 U. S. 395, 412;
> *U. S.* v. *Atkinson, supra.*

As to Reason No. 3:

The failure of the defendant to move for a mistrial on the ground of prejudice in nowise mitigates the prejudicial nature of the trial or the duty of the Court of Appeals to reverse and remand for the prejudice that had in fact taken place.

> Rule 52, Rules of Criminal Procedure;
> *U. S.* v. *Atkinson, supra;*
> *United Brotherhood* v. *U. S., supra;*
> *Lash* v. *U. S.*, 221 F. 2d 237;
> *U. S.* v. *Asendio*, 171 F. 2d 122;
> *Robertson* v. *U. S.*, 171 F. 2d 345.

The Trial Court was on full notice that defendant objected to all of the prejudicial testimony both on the ground of irrelevancy as well as that of prejudice.

Objection and exception to the offending evidence having been promptly taken, the error was preserved for review regardless of any motion for a mistrial.

As to Reason No. 4:

It is categorically stated that the Court of Appeals is in complete and obvious error in advancing this reason.

Contrary to the statement by the Court of Appeals, there was no interrogation of Dr. Powell by defense counsel even remotely approaching the highly inflammatory, improper and prejudicial question *asked by the Government of its own witness Congressman Powell:*

> "Now, Mr. Powell, has any pressure, in any manner, shape, or form, directly, or indirectly, been put on you by the White House or anybody in the United States Government in connection with this case?"

The only justification ever advanced by the prosecution was the statement to the Court of Appeals that:

> "* * * the United States Attorney's purpose in asking the question was to make it clear that Powell was not involved in any political improprieties in connection with the trial of the case" (Government Brief in Court of Appeals, p. 27).

The "reason" justifying the question is as disingenuous as the question itself.

The political accusations that Congressman Powell had made a "deal" to save his own neck had occupied all news media for days preceding his appearance on the stand as a prosecution witness. Whether the jury was ignoring these stories was problematical at best. How the Democrats on the jury reacted to the defection of Congressman Powell or how the Republicans on the jury reacted to their new-found ally will never be known. Certainly the dignity of the Government of the United States required the prosecution to exert every effort to keep politics out

of the courtroom. Not only was no such effort exerted but the prosecution encouraged the jury to give vent to its political emotions by injecting Congressman Powell's politics into the trial in its very opening and as soon as he appeared on the stand.

The Trial Court recognized the situation and in sustaining defense objections to the offensive question, stated:

> "This is purely a tax evasion trial and there are no politics going to enter into this case as long as I am sitting on this Bench" (G. 84a).

From the beginning of the trial it was obvious that the prosecution was more interested in Congressman Powell than in the defendant.

On the other hand, the questioning by defense counsel of Congressman Powell as to whether he had spoken to anyone in the Government prior to taking the stand, bore absolutely no relationship to the question that was asked by the prosecution.

Congressman Powell was called by the Government as its witness. He was interrogated on the stand as to the Tenants Protective Association; his association with David Kent; his association with Paul Klein; his association with the defendant; his knowledge of Tenants Protective Association; the destruction of Tenant's Association records; the filing of tax returns by Tenants Protective Association, etc., etc. About many matters Congressman Powell was vague, uncertain and hesitant. His very vagueness, uncertainty and hesitancy was damaging to the appellant, for he was appellant's employer and alleged friend and he was testifying as to matters concerning which the appellant was criminally charged. His vagueness, his uncertainty and his hesitancy gave the appearance of reluctance, a reluctance to testify against appellant (G. 83a-118a).

Was it not logical then, to ask on cross-examination in an effort to show that the Government had never investigated Congressman Powell's knowledge of the facts, was conducting a political exposé, was dealing with a witness who was unprepared and surprised, and to show the prosecution's complete irresponsibility:

> "Q. Dr. Powell, up until your appearance on the stand this morning, has anyone from the government ever attempted to talk to you *concerning your knowledge of these matters that you were interrogated on this morning?* A. No one, sir" (G. 118a). (Emphasis supplied.)

Can anyone capable of rational thought conclude that the foregoing question is the same as the question by the prosecution as to "White House pressure"?

If there is even a lingering doubt at this point that Congressman Powell was the real "defendant" in the trial, the following colloquy is revealing:

(Paul Klein, recalled by the Government)

> "*By Mr. Bolan*: * * *
>
> Q. Have you done anything to refresh your recollection since that meeting with me in my office? (The meeting took place in March, 1956.) A. Yes, sir.
>
> Q. What did you do? A. You suggested that I speak to Congressman Powell——
>
> Mr. Feldman: Your Honor, I object. How is this binding on the defendant?
>
> The Court: I will allow that. You say you talked to Congressman Powell?
>
> The Witness: Yes.
>
> The Court: When did you talk to him?

The Witness: Soon after the conversation with Mr. Bolan.

The Court: And when was that?

The Witness: As a rough guess, if I saw Mr. Bolan in mid-March, it was by the end of March, as soon as I could get him between his Washington schedule.

The Court: You talked to Congressman Powell, all right?

The Witness: Yes.

By Mr. Bolan:

Q. And what transpired?

Mr. Feldman: Well, your Honor, I am certainly going to object to any conversation between the witness and the Congressman as having no effect or not being binding on my client.

The Court: *Well, this is rebuttal.* The Congressman testified yesterday" (G. 147a-148a) (Emphasis supplied.)

Although the objection was vigorously pressed the Trial Court persisted in its ruling and the witness allowed to answer.

Despite the fact that both witnesses were produced by the prosecution on its direct case, the Trial Court allowed Klein to rebut Powell's testimony as if Powell were the defendant testifying in his own behalf.

It is submitted that not only did the defense not ask Congressman Powell any question even remotely approaching the political nature of the prosecution's question, but not a single question was asked him as to whether anyone from the Government had spoken to him relative to his

testifying at the trial. The Court of Appeals erred on all the facts regarding this issue.

As to Reason Number 5:

The instruction to the jury by the Trial Court to disregard the highly prejudical events and testimony, was brief almost to the point of absurdity. As was stated by Mr. Justice Jackson in *Krulewitch* v. *U. S.*, *supra*, at page 453:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction."

The inflammatory nature of the offending testimony, the deliberate injection of politics, the sordid spectacle of Klein, all combined to create an atmosphere so highly charged and prejudicial as to require a jury of supermen to be able to disregard it.

Yet, the Trial Court gave only a casual instruction to the jury to disregard the issue.

It is respectfully submitted that none of the reasons advanced by the Court of Appeals satisfy the long standing requirement that a defendant is entitled to a fair, impartial and unprejudiced trial. The issue is not whether an appellate court can sieve out sufficient unprejudicial evidence to warrant the conclusion that the defendant was guilty. The absolute right is that a defendant must have an unprejudiced trial.

As was stated in the *Bollenbach* case, *supra*, at page 615:

> "In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be sup-

posed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process might be."

And again, in *Ex parte Quirin, supra*, at page 25:

"We are not here concerned with any question of the guilt or innocence of petitioners. Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict punishment on some who are guilty."

Substantial prejudice warrants reversal without even consideration of the record and without consideration of guilt.

U. S. Constitution, 5th and 6th Amendments;
Mesarosk v. *U. S., supra.*

POINT II

The presence of multiple and unrelated issues in each count required an instruction designed to avoid a compromise verdict.

1. **The defendant was entitled to a special verdict on each issue or, in the alternative, a charge appropriate to discountenance, discourage and forbid the jury from reaching a compromise verdict.**

2. **The failure of the Trial Court to adopt either of the foregoing alternatives, coupled with a charge which encouraged a compromise verdict, constituted reversible error.**

The question raised by this point is novel and has never been decided by this Court.

At issue is a defendant's right to receive either separate verdicts or a clear and unequivocal instruction in a situation where multiple and unrelated issues are contained in each count of an indictment.

It is respectfully submitted that absent any rule against special verdicts, the defendant was entitled to an instruction calling for a separate verdict and the failure to grant the request therefore deprived the defendant of a fair trial.

It is further submitted that the failure of the Trial Court to clearly and unequivocally separate the two issues contained in each count so as to make certain, so far as was possible, that the jury did not reach a compromise verdict, also constituted reversible error.

The Court of Appeals, in its determination of the issue raised by this point, misconstrued the defendant's position, and in so doing concluded that the defendant was

objecting that each count of the indictment was duplicitous. Actually, the defendant at no time raised the issue of a duplicitous indictment and, as a matter of fact, went to considerable pains to point out to the Court of Appeals that such was not the question being raised.

26 U. S. C. A. 145(b) describes the crime as being the wilful *attempt* to evade taxes. The definition of "attempt" or the manner in which such attempt can be made, or the number of attempts which may be made in any given year, is not set out in the statute.

It follows that for any given year a taxpayer may be charged with an attempt to evade taxes in a number of ways. Thus, as in the case at bar, he may be charged with filing a return which is false in two unrelated aspects, *i.e.*, unreported income and improper dependents.

In determining the guilt or innocence of a taxpayer so charged, the jury must unanimously agree that the return was false in at least one of the aspects. The reason for this is self-evident. If, hypothetically, the first six of the jurors believe the return to be false for unreported income, then the other six must of necessity believe the contrary. Similarly, if the second six believe the return to be false for improper dependents, then the first six must of necessity believe the contrary. The fact that there are twelve jurors who, for one reason or the other, are unanimous in their belief that the defendant is guilty of an attempt is immediately counterbalanced by the fact that the same twelve jurors are simultaneously unanimous in their belief that the defendant is also innocent of an attempt, for one reason or the other.

Was the return false for unreported income? The defendant had the absolute right to have the jury unanimously agree before finding him guilty.

Was the return false as to dependents? The defendant had the absolute right to have the jury unanimously agree before finding him guilty.

But, if only one juror believed the defendant was innocent of the dependency charge, and only another juror believed he was innocent of the unreported income charge, then the conviction of the defendant would be a complete violation of his rights.

Rule 31, Rules of Criminal Procedure.

As has been set forth in the statement of the case, *supra*, the two issues contained in each of the counts were completely unrelated. Proof of one was not proof of the other. Guilt of one did not even imply guilt of the other.

Several days prior to the Trial Court's charge to the jury, the defense submitted written requests to charge. The very first of such requests included the following statement:

> "To avoid such a consequence the Court is respectfully requested to instruct the jury to advise the Court as to its finding on each of the items in each of the counts as well as to its general verdict on each count. In this manner the Court will be able to determine whether the general verdict reached was so reached within the limits of the Court's charge.
>
> * * * * *
>
> Under no circumstances must the use of an omnibus count be permitted to preclude the defendant from a fair trial by rendering difficult, if not impossible, the testing of the jury's verdict" (A. 168a).

Instead the Trial Court charged only the general verdict as follows:

> "You will, therefore, with respect to each count return a verdict of guilty or not guilty. If you find that the Government has established, beyond a reasonable doubt, that the defendant, with respect to a particular year, had knowingly and wilfully understated his income, or had knowingly and wilfully claimed as dependents persons who were not his dependents, and if you conclude that the Government has established, beyond a reasonable doubt, that the defendant did this knowingly and wilfully with an attempt to evade and defeat part of the income tax owing by him, then you may find the defendant guilty on that count of the indictment to which those facts relate" (A. 192a).

Exception was properly noted to the charge (A. 204a).

The unitary nature of the instruction was such as to leave in doubt how the jury was to treat with the specific and unrelated issues in each count.

After 3 hours of deliberation, the jury returned to ask the two questions previously set out in the "Statement of Case" at page 19 herein.

It was the response to those two questions that left the jury free as air. When the Trial Court charged that:

> "It is not necessary to decide on each of the items referred to in the bill of particulars; it is only necessary to decide whether or not on the particular count which relates to a particular year, the Government has proved beyond a reasonable doubt that a substantial portion of the defendant's tax liability had been wilfully and knowingly evaded by the taxpayer" (A. 202a).

the Trial Court in its last and decisive word to the jury actually encouraged a compromise verdict.

The jury was encouraged to take a broad overall approach. In effect, they were told that if all twelve could agree that he was guilty of something then they were to convict.

It is respectfully submitted that the specific ruling was in error, and the Court of Appeals reversibly erred for failing to reverse and remand therefor.

As was stated in *Bollenbach* v. *U. S., supra*, at page 612:

> "Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge."

The odor of compromise is all pervading in the case at bar. The facts involving the jury's deliberations, the time involved in the deliberations, the impending weekend, and the strong suggestion by the Trial Court that the jury should reach a verdict all lead to the conclusion that a compromise verdict may have occurred.

The jury got the case on Thursday, October 18, 1956, at 11:35 A.M. after two weeks of trial.

Three hours later, at 2:25 P.M. they received the specific ruling previously noted.

At 11:05 P.M., the Trial Court recalled the jury to ask whether they wished hotel accommodations. In the course of these remarks, the Court stated:

> "Deliberation and discussion is a great thing in our jury system with an attempt to reach a verdict. Of course, if you do not reach a verdict it simply

means that the case has to be retried again with the expense and delay to all, so if the jury will retire again and let me know what you want to do.

Mr. Feldman: I am sure your Honor did not mean to indicate that any juror should reach a verdict just for the purpose of saving expense and avoiding delay.

The Court: No, deliberation and discussion, and be careful in reaching a verdict, which should be the honest verdict of the jurors, as that is always desirable" (A. 206a).

At 11:35 P.M. the jury was locked up for the night.

On Friday, they resumed their deliberations at 10:00 A.M. and returned their verdict at 12:50 P.M.

In all, more than 25 hours had elapsed.

If the jury had not reached agreement when they did they would have been locked up again and perhaps over the week-end.

As was stated in *Bollenbach* v. *U. S.*, *supra*, at page 612:

> "An experienced trial judge should have realized that such a long wrangle in the jury room as occurred in this case would leave the jury in a state of frayed nerves and fatigued attention, with the desire to go home and escape overnight detention, particularly in view of the plain hint from the judge that a verdict ought to be forthcoming."

By Friday, compromise was the order of the day and the charge did nothing to discourage it.

It is self-evident that the practice of including multiple and unrelated issues in a single count of an indictment works a severe prejudice on a defendant. It cannot be presumed that a jury composed of laymen is capable of

maintaining such singleness of mind as to enable it to lay aside all evidence unrelated to a particular issue once such evidence is before it. As a matter of fact, it is fair to state that such a task is difficult even for an experienced jurist. It is unreasonable to expect such an ability from a jury.

In the case at bar, the Trial Court had in its possession, well in advance of its instruction to the jury, a written request to separate the two unrelated issues. The request was proper and consistent with the requirements of a fair trial to the defendant.

With regard to separate verdicts, there has been no statement by this Court, either favoring or rejecting such verdicts in criminal cases. To the extent that lower courts have expressed adherence to a rule that special verdicts are not to be countenanced in criminal actions, research indicates no foundation whatever for such pronouncements.

With regard to an expression of opinion by this Court concerning separate verdicts, the most recent statement appears in *Stein* v. *People of the State of New York*, 346 U. S. 156.

In the *Stein* case, involved was the submission of an issue involving a coerced confession along with the general issue of guilt of the crime charged. In discussing this type of submission the majority stated at page 177 (and the dissents took no issue therewith):

> "Petitioners suffer a disadvantage inseparable from the issues they raise in that this procedure does not produce any definite, open and separate decision of the confession issue. Being cloaked by the general verdict, petitioners do not know what result they really are attacking here. For all we know, the confession issue may have been decided in their

> favor. The jury may have agreed that the confessions were coerced, or at least that the State had not met the burden of proving beyond a reasonable doubt that they were voluntary."

In writing on the problem involved, this Court, at p. 177, took particular notice of the practical problems in a multiple submission.

> "Perhaps a more serious practical cause of dissatisfaction is the absence of any assurance that the confessions did not serve as makeweights in a compromise verdict, some jurors accepting the confession to overcome lingering doubt of guilt, others rejecting them but finding their doubts satisfied by other evidence, and yet others or perhaps all never reaching a separate and definite conclusion as to the confessions but returning an unanalytical and impressionistic verdict based on all they had heard."

Before reaching the question of separate verdicts, this Court took particular pains to set out the minimum requirements for an instruction to the jury where multiple issues are to be submitted, thus, and at p. 178, this Court stated:

> "Courts uniformly disapprove compromise verdicts but are without other means than admonitions to ascertain or control the practice. Defendants, when two or more issues are submitted, are entitled to instructions appropriate to discountenance, discourage, and forbid such practice."

This Court then went on to consider special verdicts in criminal cases and stated with regard thereto, at p. 178:

> "But no general practice of these techniques has developed in American criminal procedure. Our own Rules of Criminal Procedure make no provision

for anything but a general verdict. Indeed, departure from this has sometimes been resisted as an impairment of the right to trial by jury, see *People* v. *Tessmer*, 171 Mich. 522; 137 N. W. 214, 41 L. R. A., N. S., 433; *State* v. *Boggs*, 87 W. Va. 738, 106 S. E. 47, 18 A. L. R. 1360, which usually implies one simple general verdict that convicts or frees the accused." *

Such opposition as seems to exist in the lower courts to the special verdict seems to be directed to the use of the special verdict to establish a factual finding vital to the single issue in a count. No one has written with regard to the use of the special verdict where multiple issues are contained in a single count.

Since each of the unrelated issues standing alone would, if proved, constitute the crime charged (an attempt to evade), the special verdict was not only appropriate, it was mandatory if the trial was to be fair.

This Court has at no time ruled that special verdicts are improper. As a matter of fact, in the past this Court has treated with special verdicts in criminal cases without adverse comment thereon:

U. S. v. *Jackalow*, 66 U. S. 484, 1 Black 484, 17 L. Ed. 225.

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*The doctrine outlined in *People* v. *Tessmer, supra,* finds its origin in *People* v. *Marion,* 29 Mich. 31, 40 as followed by *People* v. *Roat,* 117 Mich. 578, 582, 76 N. W. 91. The only reason advanced to support the position taken was that to permit a special verdict would be "revolutionary".

State v. *Boggs,* cites no authority for its holding other than Clementson on Special Verdicts, page 49, to the effect that interrogatories to a jury would "impair the right of trial by jury secured by the Constitution."

The expression of the alleged "rule" that it is not the practice of the federal courts in criminal cases to call for special verdicts has its derivation in nothing more than a passing obiter appearing in an early criminal case; *U. S.* v. *Watkins*, decided in 1829, 28 Fed. Cases 419, Fed. Case No. 16, 1649, 3 Cranch C. C. 441, 3 D. C. 441.

In the *Watkins* case, the relied on statement is as follows, appearing in 28 Fed. Cases 484:

> "That the only way in which the jury can decide the law of a case is, by giving a general verdict, which necessarily involves the question of law as well as of fact."

Thereafter we find the following statement in *Anderson* v. *U. S.*, 273 F. 677:

> "It is not the practice of the federal courts in criminal cases to call for special verdicts."

The *Anderson* case cites as authority for its holding, the case of *United States Mutual Accident Association* v. *Barry*, 131 U. S. 100. The *Mutual Accident* case was a *civil cause* involving the application of Wisconsin law on the issue of whether a special question could be submitted to a jury after a general verdict had been reached.

There is nothing about the special verdict which makes it inapplicable to a criminal cause under appropriate circumstances. Certainly whether a special verdict should be submitted to a jury depends entirely upon the issues involved.

The basic responsibility for the disability to a defendant suffered in submitting multiple issues in a single count lies with the United States Attorney in whose district the Grand Jury indicts. Although it is true that a Grand Jury

acts independently in determining whether an indictment should issue, only the most naive would assume that the ultimate indictment is drawn by the Grand Jury itself. Actually, the indictment is drawn by the United States Attorney in charge of the matter at the time of its presentation to the Grand Jury. Prime responsibility for the inclusion of multiple issues in a single count must of necessity rest with the Government.

In the case at bar there was nothing which prevented the United States Attorney from setting forth each separate issue in a separate count. Had this been done, the verdict of the jury could have been tested both by the Trial Court and the Court of Appeals as against the evidence submitted.

It is respectfully submitted that so long as United States attorneys persist in issuing omnibus counts, then protection of the defendant's right to a fair trial requires acceptance of the principle of the special verdict—especially where the defendant demands it. Certainly there is no imposition on the jury nor any diminution of its function. As a matter of fact, it would make the task of the appellate courts in a criminal case far easier, for it would permit more precise review where multiple issues are involved.

Further, the defendant would have had the benefit of knowing that a unanimous verdict was reached if on any particular issue a verdict of guilty was rendered. On the other hand, the defendant would have had the assurance that every effort had been made to avoid the possibility of a compromise verdict.

It is interesting to note at this point that the separate verdict has inferentially been spoken of with favor. Thus, in *Sullivan* v. *U. S.*, 222 F. 2d 56, where the count involved included multiple issues of far greater interralationship

than that in the case at bar, the Court of Appeals stated, in affirming:

> "It will suffice to say that * * * counsel for the appellant did not ask the Court below to submit the case to the jury for a special verdict, and that instead of objecting to the charge before the jury retired to consider the verdict as required by Rule 30 of the Federal Rules of Criminal Procedure, 18 USCA, he said to the court at that time 'I am satisfied.'"

The only case in which a special verdict was held to constitute reversible error is *Gray* v. *U. S.*, 174 F. 2d 919 (8 Cir.), cert. den. 338 U. S. 848. In the *Gray* case, the basic reason advanced by the Court of Appeals for reversing was the absence of a pronouncement by this Court, and was stated as follows:

> "It is not the function of the courts subordinate to the Supreme Court to introduce innovations of criminal procedure. The action of the court requiring the separate verdicts duly excepted to by appellant constituted error."

It is vital to note that in the *Gray* case the defendant objected to the submission of the special verdict to the jury and took the position of an all or nothing verdict on the count.

It is submitted that giving to trial judges the right to submit multiple issues by way of special verdicts will do much to alleviate the prejudicial condition created by the use of omnibus counts and will thus enhance and improve the effieient administration of justice in the federal courts.

It is respectfully submitted that the defendant was entitled to have a charge of such clarity as to discourage the possibility of a compromise verdict. The inadequacy of the charge constituted error.

The defendant was also entitled to have a separate resolution of each unrelated issue in each count. The failure to call for a special verdict on each unrelated issue in each omnibus count worked a still further prejudice in a trial in which prejudice ruled the roost.

CONCLUSION

It is accordingly prayed that the writ be granted.

Acy Lennon,
Petitioner, Pro Se.

Leonard Feldman,
64 Wall Street,
New York 5, N. Y.,
Counsel for Petitioner.

APPENDIX

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 255-256—October Term, 1956.

(Argued March 7, 1957 Decided June 12, 1957.)

Docket Nos. 24411-24412

—o—

UNITED STATES OF AMERICA,

Appellee,

—v.—

ACY LENNON,

Defendant-Appellant.

—o—

Before:

MEDINA and WATERMAN, *Circuit Judges,*
and GALSTON, *District Judge.*

Appellant, prosecuted for willfully attempting to evade income tax payments, was tried by jury and convicted in the District Court, Southern District of New York, Dawson, *J.*, and he appeals. Judgment of conviction affirmed.

PAUL W. WILLIAMS, U. S. Atty., S. D. N. Y. (Thomas A. Bolan, Asst. U. S. Atty., of counsel), *for appellee.*

LEONARD FELDMAN, New York City, *for defendant-appellant.*

WATERMAN, *Circuit Judge*:

The defendant, Acy Lennon, appeals from a judgment of conviction on four counts of a six count indictment. He was charged with willfully attempting to evade income taxes by filing false returns for the calendar years 1949 to 1954 in violation of 26 U. S. C. A. §145(b), Int. Rev. Code of 1939.[1] In each of the four counts on which the jury returned a verdict of guilty, covering the years 1949 to 1952, the defendant was charged with knowingly understating his net income and with claiming two exemptions to which he knew he was not entitled.

At the trial evidence was adduced tending to establish the following facts: The defendant, during the years here in question, was employed as a Congressional secretary by Congressman Adam Clayton Powell, Jr., of New York City. During this period he also received income as a recreational director for the Abyssinian Baptist Church, of which Dr. Powell was and is the minister. In addition, the defendant owned and operated a candy and stationery store, but he reported a loss from that enterprise during each of the four years here in issue.

On his income tax returns for the years 1949 to 1952 Lennon reported his income from the House of Representatives and from the Abyssinian Baptist Church. In addition, for the year 1949 he reported income of $280 from the "Citizens Comm." and $367.71 from "telephone & commissions"; in 1950 he reported $132 from "concessions tele-

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[1] The pertinent provision of 26 U. S. C. A. §145(b) reads as follows:

"* * * any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, together with the costs of prosecution."

phone" and $160 as a "rebate from ice cream." No other income was reported by appellant for the years 1949 to 1951. For the year 1952 he reported additional income of $1280 from "Commissions, Publications, etc." apparently derived from a tax service operated by the defendant in that year.

After offering the defendant's tax returns in evidence, the Government called as a witness one Joseph E. Ford, who testified that he formerly had operated an income tax service and that he had employed the defendant as a bookkeeper and interviewer from 1941 to 1951. He further testified that he had paid the following sums to the appellant for his services during the years here in issue: $1600 in 1949, $1700 in 1950, and $1600 in 1951.

The Government also introduced the testimony of one David Kent to the effect that in 1952 he had given the defendant a check for $3000 payable to the Tenants Protective Association, allegedly a non-profit organization formed to assist residents of the Harlem area of New York City in obtaining low rent housing. This payment was allegedly for commissions earned by that organization for the sale of apartments in the Dorie Miller interracial housing project. Congressman Powell was the president of this organization, and the defendant was connected with it as either an officer or an employee. The Government attempted to prove that the defendant ultimately received all or part of the $3000 as personal income. At the close of the Government's case, however, the trial judge ordered the lengthy testimony introduced in support of this contention to be stricken from the record because the Government had failed to establish that the defendant had ever pocketed any part of the controversial $3000.00.

On his returns for the years 1949 to 1952, the defendant had claimed six exemptions, including two dependent sons named "Acy, Jr." and "William." The spaces provided

for the addresses of these two dependents, in the event their addresses differed from that of the defendant, were left blank.

The Government called as one of its witnesses Vivian Della Lennon, a daughter of the defendant, who at the time of the trial in 1956 was 22 years of age. Miss Lennon testified that she had always lived with her parents and that she had no knowledge of having any brothers, except for vague "rumors" that her father had sired two illegitimate sons. Witness Ford, who claimed that he had seen the defendant almost daily while Lennon was allegedly in his employ, testified that the defendant had never mentioned the existence of any sons; and that he, Ford, although he knew Mrs. Lennon and had visited the Lennon home, had not seen or heard of any sons of the defendant.

The jury returned a verdict of guilty on the first four counts, covering the years 1949 to 1952. A verdict of not guilty was brought in on the fifth count, which covered the year 1953, and the jury disagreed on the sixth count, applicable to 1954.

On appeal the defendant urges a number of grounds for reversal, most of which are totally devoid of merit. Several warrant extended discussion, but we find no error in the proceedings below justifying a reversal. We therefore affirm the judgment of conviction.

I

The appellant first argues that the Government neither charged nor proved acts sufficient to constitute a violation of 26 U. S. C. A. §145(b). It is his contention that the filing of a false and fraudulent return, without more, cannot be the basis of a felony conviction under section 145(b), but, at most, constitutes a misdemeanor under 26

U. S. C. A. §3616(a), Int. Rev. Code of 1939.[2] This argument has already been considered and rejected by this Court, see *United States* v. *Moran*, 236 F. 2d 361 (2 Cir. 1956), *cert. denied*, 352 U. S. 909; *United States* v. *Costello*, 239 F. 2d 177 (2 Cir. 1956), *cert. granted*, 352 U. S. 988 (1957), and the Supreme Court has recently held that section 3616(a) does not apply to the evasion of the income tax. *Achilli* v. *United States*, U. S. , decided May 27, 1957. Hence the appellant's position is untenable.[3]

II.

The defendant also contends that it was prejudicial error for the trial court to submit to the jury, as single counts for each year in question, the combined issues of understatement of income and of fraudulent exemptions. It is argued that these two issues involve entirely unrelated matters, and therefore they should have been separated

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[2] The pertinent provision of 26 U. S. C. A. §3616(a) reads as follows:

> "Whenever any person—
>
> "(a) Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; * * *
>
> * * * he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

[3] The appellant attempts to rely on *Spies* v. *United States*, 317 U. S. 492 (1943), but there the Supreme Court held only that the *failure to file an income tax return and to pay income taxes, without more,* could not constitute a felony under 26 U. S. C. A. §145(b), Int. Rev. Code of 1939. Here the appellant was charged with knowingly and willfully filing false and fraudulent returns in an attempt to evade income taxes.

for individual ascertainment of guilt or innocence by the jury. But, in so asserting, the appellant misconceives the offenses for which he was being tried. The felonious act in issue for each year named in the indictment was the willful filing of a false and fraudulent income tax return. A single return, of course, could be falsified in an unlimited number of particulars. The filing of such a return, however, constitutes but a single act within the meaning of section 145(b). Hence the indictment was not "duplicitous," because each count charged only one criminal violation. See 11 Cyc. Fed. Proc. §42.109 (1952).[4] The issues of understatement of income and fraudulent exemptions were set forth in each count only as different methods by which a single offense may have been effectuated. The jury properly could have based its determination of guilt on a finding that in any given tax year the defendant knowingly understated his income, or that he knowingly claimed false exemptions, or that he did both, in an attempt to avoid taxation. Therefore the trial court correctly refused the defendant's request to separate these issues for submission to the jury.

III

The appellant next urges several fatal defects in the Government's case as grounds for reversal. He contends that, although the Government may have introduced testimony tending to prove that the defendant was not supporting two sons who resided in his home, it did not

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[4] "Duplicity in an indictment means the charging of two or more separate and distinct offenses in one count, not the charging of a single offense into which several related acts enter as ways and means of accomplishing the purpose." *Frankfort Distilleries, Inc.* v *United States*, 144 F. 2d 824, 832 (10 Cir. 1944), *reversed on other grounds*, 324 U. S. 293. See also *Empire Oil & Gas Corp.* v. *United States*, 136 F. 2d 868, 872 (9 Cir. 1943); *United States* v. *Crummer*, 151 F. 2d 958, 963 (10 Cir. 1945), cert. denied, 327 U. S. 785.

negative, by competent evidence, the possibility that the defendant was actually entitled to a total of six exemptions, as claimed in his returns for the years 1949 to 1952. The defendant's theory is that a "mere misdescription" of permissible exemptions is no evidence of an attempt to evade taxation.

We find this argument unpersuasive. The Government, once having shown the non-existence of the particular dependents claimed by the defendant, "is aided by the presumption that the deductions and exclusions listed by a taxpayer in his return are all that exist. This presumption is based upon reasonable experience (taxpayers would not knowingly fail to report all valid deductions), and has the effect of shifting the burden of going forward with the evidence to the defendant, when the Government has shown unreported income." *United States* v. *Bender*, 218 F. 2d 869, 871-72 (7 Cir. 1955), *cert. denied*, 349 U. S. 920. See also *United States* v. *Link*, 202 F. 2d 592, 593-94 (3 Cir. 1953). Cf. *Clark* v. *United States*, 211 F. 2d 100, 103 (8 Cir. 1954). The defendant was unable to show at the trial that he was entitled to any exemptions not listed in his returns, and therefore the court properly submitted to the jury the question of whether the defendant had knowingly claimed false dependents in an attempt to evade taxation.

Nor was it necessary for the Government to introduce independent evidence, apart from the defendant's tax returns, to show that the defendant had not reported his alleged income from Ford's tax service. The returns spoke for themselves. The only major sources of income listed by the defendant for the years 1949 to 1951, when he was allegedly employed by Ford, were the House of Representatives and the Abyssinian Baptist Church. Congressman Powell, the pastor of the latter, testified that Ford's tax service was not conducted under the aegis of his church.

The defendant makes an unconvincing effort to show that the income from Ford, if any, was included in the substantial gross revenues of his stationery and candy store, which annually reported a net loss during the period here in question. This claim is not plausible, however, because there appears to be no relationship in fact between the two enterprises. Thus the Government made out a sufficient case to submit to the jury the questions of whether the defendant received income from Ford, and whether he intentionally failed to report that income in an attempt to avoid taxation.

IV

Evidence of both tax evasion and willfulness was ample. On appeal the defendant strenuously attacks the credibility of Ford, upon whose testimony, along with several canceled checks made out to the defendant, the Government principally relied to prove that Lennon received unreported income from Ford's tax service. Our attention has been directed to inconsistencies in Ford's testimony and to the possible motives this witness might have had for testifying falsely. But, as we have repeatedly held, the credibility of witnesses is a matter to be resolved by the jury, not an issue to be contested on appeal. See, e.g., *United States* v. *Compagna*, 146 F. 2d 524, 526 (2 Cir. 1944) (per L. Hand, *J.*).

Apart from the evidence of unreported income, the jury could have reasonably inferred the necessary element of willfulness from the defendant's claim of two non-existent dependents throughout the four years here in question. Such assertions, particularly by one who was familiar with income tax forms, could hardly be dismissed as merely an act of ignorance or mistake. To the contrary, it would seem an almost inescapable inference that these false claims were asserted solely as an attempt to evade taxation.

V

Far more substantial is the appellant's assertion of prejudice. He contends that the Government's attempts to link him with improprieties allegedly committed by Congressman Powell and others in respect to the Dorie Miller housing project created a prejudicial atmosphere and deprived him of a fair trial. As a particularly glaring example of the alleged effort of the Government to transform this trial for tax evasion into an arena for political exposés, the appellant cites the following question put by the prosecutor to Congressman Powell when that witness for the Government first took the stand:

> "Now, Mr. Powell, has any pressure, in any manner, shape, or form, directly or indirectly, been put on you by the White House or anybody in the United States Government in connection with this case?"

The appellant also points out that approximately two-thirds of all the testimony offered by the Government concerned the Dorie Miller interracial housing project and the alleged payment of $3000 by David Kent to the Tenants Protective Association. This testimony subsequently was ordered stricken from the record by the trial judge on the ground that there was no evidence to show that the defendant had personally retained or ultimately received any part of the $3000.00.

It is the appellant's position that the striking of such evidence and the subsequent admonition to the jury by the court to disregard that evidence were insufficient to dispel the prejudice created during several days of lengthy testimony by a number of Government witnesses. There is much merit to this contention. Cf. *Krulewitch* v. *United States*, 336 U. S. 440, 453 (1949) (concurring opinion of Mr. Justice Jackson); *People* v. *Robinson*, 273 N. Y. 438, 445-46, 8 N. E. 2d 25 (1937).

Nevertheless, despite our abhorrence of any effort by either party to insinuate politics into a criminal prosecution, we do not believe that this appellant is entitled to a new trial on the facts and circumstances of this case.

Our reasons for so believing are several: (1) Putting any personal skepticism aside, we are not prepared to label as disingenuous the Government's initial line of proof concerning the Dorie Miller project. Apparently at the outset of the trial the prosecution believed it could prove that the defendant personally pocketed all or some of the $3000 allegedly paid to the Tenants Protective Association by David Kent. (2) At the very first attempt by the Government to introduce testimony relating to this facet of the case, the trial court ruled that such evidence would only be admitted "subject to connection." Counsel for the defense did not appear to contest this ruling, as his primary concern at the trial seemed to be with the relevance, not the possible prejudice, of this evidence. (3) Significantly, at no time during the trial did the defendant move for a mistrial on the ground of prejudice. (4) The trial court immediately sustained the defendant's objection to the question, quoted above, that was asked of Congressman Powell by the Government Attorney. Despite the defense counsel's apparent disturbance at such a line of inquiry, he himself interrogated Dr. Powell at some length as to whether anyone from the Government, other than the United States Attorneys, had spoken to the witness relative to his testifying in this trial. (5) At the end of the Government's case, since the prosecution had not shown that the defendant had personally profited from Kent's payment to the Association, the trial court dismissed the portion of the indictment that was based on that contention, struck all testimony relating to the Dorie Miller project from the record, and instructed the jury to disregard that testimony. The latter direction was repeated in the court's charge to the jury. (6) And, finally, the guilt of the defendant, on the basis of admissible evidence, is clear.

Judgment affirmed.

Judgments

June 12, 1956

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by Counsel.

On Consideration Thereof, it is now hereby

ORDERED, ADJUDGED AND DECREED that the judgment of said District Court be, and it hereby is, affirmed.

A. DANIEL FUSARO,
Clerk

(The identical judgment was entered on both appeals.)

Order Denying Petition for Rehearing

ORDER OF COURT

July 12, 1956

A petition for a rehearing having been filed herein by counsel for the appellant.

Upon Consideration Thereof, it is

ORDERED, that said petition be, and it hereby is, denied.

A. DANIEL FUSARO,
Clerk

(There was but a single order entered on both appeals.)

Statutes Involved

U. S. C. A., *United States Constitution, 5th Amendment*:

> "No person shall be * * * deprived of life, liberty, or property, without due process of law * * *."

U. S. C. A., *United States Constitution, 6th Amendment* —Jury Trial for Crimes, and Procedural Rights:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

U. S. C. A., Title 26 Int. Revenue Code, Sec. 145(b) states as follows:

> "(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be

fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

U. S. C. A. *Title 28—Judiciary and Judicial Procedure.*

Sec. 2111. *Harmless error.*

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties. Added May 24, 1949, c. 139, Sec. 110, 63 Stat. 105.

Title 18 U. S. C. A.—Rules of Criminal Procedure.

Rule 52: *Harmless Error and Plain Error.*

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

U. S. C. A., *Title 18—Rules of Criminal Procedure.*

"Rule 31. *Verdict*

(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court."